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No. 985

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IN THE SUPREME COURT of the UNITED STATES

OCTOBER TERM, 1962

PAUL JONES, CHAIRMAN OF THE NAVAJO TRIBAL COUNCIL OF THE NAVAJO INDIAN TRIBE, ETC.,

Appellant,

v.

DEWEY HEALING, CHAIRMAN OF THE HOPI TRIBAL COUNCIL OF THE HOPI INDIAN TRIBE, ETC., AND ROBERT F. KENNEDY, ATTORNEY GENERAL OF THE UNITED STATES, ON BEHALF OF THE UNITED STATES,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MOTION TO AFFIRM

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MOTION TO AFFIRM

Appellee, Dewey Healing, moves that the final judgment of the District Court be affirmed, insofar as the questions raised by appellant are concerned, on the ground that it is manifest that the questions raised by appellant on which the decision of the cause depends are so unsubstantial as not to need further argument.

QUESTIONS PRESENTED

1. Stripped of its narration and argument the first question raised by appellant is, did the Court err

in decreeing that the Navajo had a joint interest with the Hopi rather than an exclusive interest in those areas of the Executive Order Reservation in which the Court found the Navajo had been settled by the Secretary of the Interior.

2. The second question is prefaced in appellant's Jurisdictional Statement by two erroneous assertions. First, the Court did not find, as contended by appellant, that the Navajo were settled by the Secretary, "on all portions of the 1882 Executive Order Area not occupied by Hopis."(1) Second, contrary to the assertions of appellant, *no line of authorized Hopi use and occupancy* was ever established by the Secretary. Only an adjustment in a grazing district line was made.(2) The second question presented by appellant is, "Whether, after the Secretary of the Interior had settled the Navajos on certain lands in 1931, he had authority thereafter, in 1936 and 1943, to unsettle them *pro tanto*."

STATEMENT

This is a direct appeal on behalf of the Navajo Tribe from the final judgment and decree entered on September 28, 1960, by a district court of three judges specially constituted pursuant to Section 1 of the Act of July 22, 1958, 72 Stat. 403.(3)

The suit was commenced on behalf of the Hopi Indian Tribe to quiet title to the lands comprising the Executive Order Reservation of December 16, 1882, which lands were withdrawn from settlement and

(1) Findings of Fact 36-40, pgs. 216, 217
(2) Finding of Fact 48, pg. 211
(3) Opinion of the District Court, pgs. 2, 3

sale and set apart *for the use and occupancy of the Moqui* (Hopi), and "such other Indians as the Secretary of the Interior may see fit to settle thereon."[4] Other than the Hopi, only the Navajo Tribe asserted any interest in the reservation.

By its judgment the court below decreed that the Hopi Indian Tribe has the exclusive right and interest in and to that part of the Executive Order Reservation lying within Land Management District 6, as defined on April 24, 1943, and that the Hopi Indian Tribe and the Navajo Indian Tribe have joint, undivided and equal rights and interests both as to surface and subsurface, including all resources, in and to all of the Executive Order Reservation lying outside of Land Management District 6. Title to said lands outside of district 6 was accordingly quieted in the two tribes as a reservation, share and share alike.[5]

In his Jurisdictional Statement, appellant seeks to have this Court review that part of the judgment which

(1) Decreed a joint, undivided and equal interest to the Hopi Indian Tribe in lands outside of Land Management District 6, and

(2) Decreed in the Hopi Indian Tribe an exclusive interest in certain lands within District 6 upon which it is claimed that Navajo

(4) Opinion of the District Court, pg. 2
(5) Judgment of District Court, pgs. 225-228, inclusive.

Indians had once been settled by the Secretary of the Interior.[6]

The questions as raised by appellant fall in the category of determining whether the trial court erred in so decreeing. In support thereof appellant sets forth in his Jurisdictional Statement certain data which he describes as being a "drastic compression" of a long opinion and record into "simply the essentials necessary to an understanding of the questions raised . . ." (J.S. pg. 6)

The Jurisdictional Statement is so partisan in its design that supplementation and correction are essential to a fair presentation of the case. In the interest of brevity and specificity we hereinafter set out, in italics, some of the quotations from appellant's "Statement" to which we object and in each case follow with our own observation and references to the record:

> *1. "As originally recommended by the Hopi agent in the field, an area of land for the exclusive use of the Hopis was in contemplation (Op. 116-118, 120); the 'and such other Indians' clause was added by the Commissioner of Indian Affairs in Washington before submission to and signature by the President (Op. 118)." (J.S. pg. 6)*

In answer thereto we cite from the opinion of the Court:

"This was a customary provision in execu-

(6) A separate appeal, numbered 1050 in the Supreme Court of the United States, filed by the Hopi Indian Tribe relates to the questions as to whether the Secretary of the Interior had authority to settle Navajo Indians and the Navajo Indian Tribe upon any part of the Executive Order Reservation and whether the Navajo, having a reservation of their own, can also share in the Hopi Executive Order Reservation.

tive orders of that period. In 1 Ex. Order 195, I Kappler 916, dated April 9, 1872, a reservation was set aside for named bands of Indians in Washington Territory, 'and for such other Indians as the Dept. of Interior may see fit to locate thereon.' Between that date and December 16, 1882, as shown by plaintiff's exhibit No. 263, nine additional orders, setting aside reservations for named Indian tribes, contained a similar provision.

"On the other hand, when it was decided to give immediate reservation rights to specific Indians then residing in the area, in addition to the named Indians for whom the reservation was principally created, officials know how to make this clear in an executive order. Just four days prior to the issuance of the order of December 16, 1882, an executive order was issued establishing the Gila Bend reservation. It was therein recited that the reservation was created for the '. . . Papago *and other Indians now settled there*, and such other Indians as the Secretary of the Interior may see fit to settle thereon.' (Emphasis supplied.)"[7]

2. *"In the period just following 1882, the Indian Office invoked military force to expel the Navajos from that portion of the Executive Order used and occupied by the Hopis, (Op. 123-129)." (J.S. pg. 6)*

The requested expulsion was to have been from the entire Hopi reservation, as shown by the letter of the Secretary of the Interior to the Secretary of War in 1888, which stated:

"The reservation of Moquis Indians was set apart by Executive Order of October[8] 16, 1882, for them, and such other Indians as the Secretary of the Interior may see fit to settle thereon. It comprises no land set apart for the

(7) Opinion of the District Court, pgs. 19, 20
(8) "October" should be December. This was an error by the writer of the letter.

Navajos, and no Navajos have been settled thereon by the Department, nor have they any right to drive or graze their flocks and herds over the Moqui lands.

". . . I therefore have the honor to request that you will give the necessary orders for the movement of a company of troops or such other force as may be deemed necessary for the purpose, under the command of a judicious, discreet, and firm officer with instructions to visit the Moqui reservation and also the Navajo reservation and especially those portions of each lying adjacent the one to the other, and to remove all Navajo Indians found trespassing with their herds and flocks on the Moqui reservation and to notify them that their depredations must cease and that they must keep within their own reservation."[9]

3. "Actually, although troops were called out in 1888 and in 1890 (Op. 123-126, 128-219), the Army opposed the removal of the Navajos who were settled within the executive Order Area, not only because of hardship to them in winter, but in any event not unless and until a line of separation was established between the Hopis and the Navajos to settle for the future the respective lands to be used and occupied by the members of each tribe (Op. 124-126, 128-130)." (J.S. pgs. 6, 7)

In truth, the army captain stated that *until the boundary line between the Navaho and Hopi Reservation* was distinctly marked, only persuasive measures would be used towards the Navaho in this regard.[10]

4. "Moreover, at no time did any of the Army's efforts contemplate expulsion of Navajos from the entire 1882 Executive Order Area, but only from the limited portion thereof used and occupied by the Hopis (p. 123-130)." (J.S., pg. 7)

(9) Pl. Ex. 19, Vol. 1, pg. 65, Extracts from Pl. Ex.

(10) Chronological Account of District Court, pg. 129

The Secretary of War on October 13, 1888, wrote the Secretary of the Interior referring to the latter's request, as hereinbefore set out, and stated:

> "In reply I beg to advise you that your letter with its enclosures has been referred to Major General Commanding the Army, with instructions to take action in accordance with your request."(11)

In the chronological account at page 124, the trial court said:

> "The result was that, on November 15, 1888, Col. E. A. Carr, commanding officer at Fort Wingate, New Mexico, received orders from the Adjutant General, Department of Arizona. These orders were to send an expedition to the reservation area with instructions to prevent Navajo trespassing and keep them within *their own reservation*. Col. Carr telegraphed the Adjutant General that, in compliance with these orders, Capt. Com. M. Wallace and fifty men, infantry, cavalry and scouts, would be sent on the expedition." (Emphasis ours)

On page 130 the court further stated

> "It was his (General McCook's) view that the line of demarcation *between the Navajo and Hopi reservations* be distinctly marked by indestructible monuments and that the water in the neighborhood of the line and lying east thereof be reserved for the Navajos, and that to the west for the Hopis. General McCook stated that, until this is done it would not be wise to use force to prevent the Navajos from grazing near the Hopi reservation." (Emphasis ours)

5. *"The last suggestions emanating from the Indian Office that any of the Navajos living there were trespassers came in 1899 and 1900 (Op. 135-136)." (J.S. pgs. 7, 8)*

An example of the inaccuracy of this statement

(11) Pl. Ex. 20, Vol. 1, pg. 67, Extracts from Pl. Ex.

is found in the Fifty-Third Annual Report of the Board of Indian Commissioners to the Secretary of the Interior, 1922, which contained the following:

> "There is no doubt that the majority of these (Navajo Indians) on the Moqui Reservation have come in from all sides with a deliberate purpose of taking the grazing land which rightfully belongs to the Hopi."[12]

6. "In 1893 attempts were made to allot lands therein to individuals, but the plan was abandoned in the face of Hopi preference for communal ownership (Op. 134)." (J.S., pg. 8)

Appellant omits reference to the fact that the Commissioner of Indian Affairs directed that no person should be allowed an allotment unless the father or mother was a recognized Moqui Indian and that no allotments were to be made to Indians other than Moquis except by express authority of the Office of the Commissioner.[13]

7. "In 1909 there was a second effort to allot ands to each Indian residing in the Executive Order Area, irrespective of whether the allottee was a Hopi or a Navajo. (Op. 138)" (J.S. pg. 8)

Appellant omits from his statement the fact that the same letter authorizing Navajo allotment instructed Agent Murphy that if the Navajo declined to accept allotments in the Moqui Reservation of the areas specified, they could be removed from the reservation,[14] and that he was further instructed that such Navajo allottees "must be required to choose the reservation on which they will take *all* their lands. They cannot

(12) Pl. Ex. 251, Vol. II, pg. 262, Extracts from Pl. Ex.
(13) Pl. Ex. 35, Vol. I, pg. 118, Extracts from Pl. Ex.
(14) Pl. Ex. 119, Vol. II, pg. 164, Extracts from Pl. Ex.

be permitted to take part of their allotment on the Moqui Reservation, with the understanding they will be given the remainder on the Navajo, or Navajo Extension Reservation."[15]

Space limitations do not permit further detailed analysis of all of appellant's "Statement". However, we direct the court's attention to the fact that the district court having found there was no "settlement" of Navajo Indians prior to 1931,[16] appellant's repeated use of the term "settled" is not to be taken in the sense of Secretarial settlement as contemplated by the Executive Order.

In addition to the foregoing it should be noted that appellant has omitted from his "Statement" such "simple essentials" as the following:

a. The Executive Order Reservation of 1882 was created for the Hopi Indians for the purposes, among others, of reserving to the Hopi sufficient living space against advancing Navajo, to minimize Navajo depredations against the Hopi,[17] and its establishment followed long years of repeated complaints concerning Navajo aggression against the Hopi.[18]

b. None of the twenty-one Secretaries of the Interior who served from December 16, 1882, to July

(15) Pl. Ex. 123, Vol. II, pg. 471, Extracts from Pl. Ex.
(16) Finding of Fact 35, pg. 216
(17) Finding of Fact 16, pg. 212
(18) Pl. Ex. 6, Vol. I, Extracts from Pl. Ex., pg. 33
Pl. Ex. 7, Vol. I, Extracts from Pl. Ex., pg. 35
Pl. Ex. 9, Vol. 1, Extracts from Pl. Ex., pg. 40
Pl. Ex. 10, Vol. I, Extracts from Pl. Ex., pg. 42
Pl. Ex. 153, Vol. I, Extracts from Pl. Ex., pg. 125
Pl. Ex. 268, Vol. I, Extracts from Pl. Ex., pg. 126

22, 1958, or any authorized representative, ever expressly ordered, ruled or announced, orally or in writing, that pursuant to the discretionary power vested in him under the executive order he had "settled" any Navajo in the 1882 reservation, or had authorized, any Navajo to begin, or continue, the use and occupancy of the reservation for residential purposes.[19] (Notwithstanding this, appellant states that the court held that all of the Navajo on the reservation had been settled thereon by the Secretary, either impliedly or *expressly*. (J.S., pg 12.))

c. Prior to February 7, 1931, no Secretary of the Interior nor any authorized representative, expressly or by implication, authorized the Navajo Indian Tribe or any Navajo Indians, whether living within the reservation or not, to use and occupy any part of the reservation for residential purposes.[20]

d. The Navajo by trespass and sheer weight of numbers took over approximately four-fifths of the Hopi Reservation, interferring with Hopi uses therein for grazing, farming, gathering wood, fuel, food, plants, dyes, materials, evergreens for ceremonial purposes, and for hunting.[21]

e. The Hopi were repeatedly assured by the Commissioner of Indian Affairs that the establishment of Land Management District 6 as a grazing district was not a delineation of a reservation boundary

(19) Finding of Fact 21, pg. 213

(20) Finding of Fact 35, pg. 216. For minor exception noted therein see Finding of Fact 27, pg. 215

(21) Opinion of the District Court, pg. 93; Findings of Fact 44, 49, pgs. 220-221

for the Hopi Tribe;[22] that the creation of District 6 was not a finding as to what area the Hopi should occupy;[23] and that their exclusion from all but District 6 was not intended to prejudice the merits of the Hopi claims.[24] These assurances were all confirmed in 1945 by the Commissioner of Indian Affairs in a letter to Senator Burton K. Wheeler, which stated:

> "In order to protect the Hopis against additional encroachment by Navajo livestock upon the Hopi range, certain limits were established beyond which Navajo livestock would not be allowed to graze. This was in no sense an establishment of boundary lines of the Hopi Reservation. Those boundary lines still are the lines of the Executive Order Reservation . . . They have been assured several times that these fences do not establish any boundary line for the Hopi Reservation and that no new delimitation of the reservation boundaries is intended."[25]

ARGUMENT

The first question raised by appellant as to whether the court erred in decreeing that the Navajo did not have an exclusive interest in the areas of the reservation in which the court found the Navajo had been settled by the Secretary of the Interior is not substantial because the District court was so manifestly right in its determination of this question. The Executive Order of December 16, 1882 established the reservation "for the use and occupancy of the Moqui, (Hopi) and such other Indians as the Secre-

(22) Chronological Account of District Court, pgs. 176, 177
(23) Chronological Account of District Court, pg. 181
(24) Findings of Fact 48, 50, pg. 221
(25) Pl. Ex. 231, Vol. III, pg. 429, Extracts from Pl. Ex.

tary of the Interior may see fit to settle thereon."[26]

The court in its opinion stated,

> "In the quoted clause the 'Moqui' Indians are specifically named, a comma appears after the word, 'Moqui', and there is no comma after the word 'Indians'. This specific reference to the Hopis, and the punctuation, indicate that the words 'as the Secretary may see fit to settle thereon,' do not apply to the Hopi Indians, but only to 'such other Indians'. Under this construction the Hopis would appear to have acquired immediate rights and interest in and to the 1882 reservation, without the need of any Secretarial action permitting them to 'settle' on the reservation."[27]

The Hopi reservation was confirmed by the Act of July 22, 1958.[28]

The appellant's use of the phrases "egregious error", "obvious misreading" and "demonstrably inadmissible construction" does not explain how he contends the Navajo ever received the whole interest in part of the reservation to the exclusion of the Hopi. The Secretary was given discretion as to whether he would settle any other Indians upon the reservation. The court not only held that the Secretary intended to limit the area upon which he settled Navajo Indians, but the court also held, as the Solicitor of the Department of the Interior had previously held,[29] that,

> "The virtual exclusion of Hopi Indians, accomplished by administrative action extending from 1937 to 1958, from use and occupancy,

(26) Opinion of the District Court, pg. 2
(27) Opinion of the District Court, pg. 9
(28) Opinion of the District Court, pgs. 2, 3
(29) Sol. Opinion (Margold) Feb. 12, 1941

> for purposes of residence and grazing, of that part of the 1882 reservation lying outside of district 6, as defined on April 24, 1943, has at all times been illegal."[30]

This holding is supported by more than a "Hopi fixation". (J.S. pg. 16) It is founded upon the Executive Order, a presidential recognition of centuries old Hopi rights, confirmed by Congress.

The Act of July 22, 1958 did provide that,

> "Lands, if any, in which the Navaho Tribe or individual Navaho Indians are determined by the court to have the exclusive interest shall thereafter be a part of the Navaho Indian Reservation:"[31]

But aside from the congressional grant to the Hopi of the lands described in the Executive Order, the court found and concluded, upon competent and substantial evidence that neither the Navajo Tribe nor any Navajo Indians had any exclusive interest in the area outside of district 6, and further determined that during the years the Hopi Indians have continuously made use of a large part of that area for the purpose of cutting and gathering wood, obtaining coal, gathering of plants and plant products, visiting ceremonial shrines, hunting and also for limited grazing and residential purposes.[32]

Appellant argues that by the Act of July 22, 1958 Congress directed that the reservation be divided. It did no such thing. It did no more than recognize that

(30) Conclusion of Law 12, pg. 224
(31) Opinion of the District Court, pg. 3
(32) Finding of Fact 44, pg. 220, Conclusion of Law 13, pg. 224

a controversy existed. Anticipating that the court might find areas in which neither tribe had an exclusive interest,[33] Congress provided that the two tribes could "sell, buy or exchange any lands within their reservation". Appellant also contends that Congress intended that this controversy should ultimately be determined by the Supreme Court. In providing for direct appeal Congress certainly intended that this court review this case only if an appellant could meet the established requirements of this court for review on appeal.

Appellant seeks to avoid the congressional limitations placed upon the President and the Secretary of the Interior with respect to Indian reservations. This he attempts to do by improper references to selected excerpts from the legislative history of the Acts of May 5, 1918,[34] and March 3 1927,[35] in contradiction of the clear and unambiguous provisions of the Acts. Such references have been repeatedly forbidden by the decisions of this court in the absence of ambiguity.[36] But even if we carefully examine the legislative proceedings, by what "strained processes of deduction"[36] can we conclude that one reason spoken into the record excludes all other reasons for enactment of a statute that is clear and obvious in its prohibitions.

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(33) Opinion of the District Court, pgs. 101-104, & foot note 94 thereto.

(34) J.S. pg. 5

(35) J.S. pg. 5

(36) Gemsco Inc. v. Walling, 65 S. Ct. 594, 324 U.S. 244, 89 L.Ed. 921
Ex Parte Joseph Collett, 69 S. Ct. 944, 959, 337 U.S. 55, 93 L.Ed. 1207

We suspect that appellant's dissatisfaction with the joint tenancy provisions of the judgment is not because of impractical administration. The sustaining of the Hopi position on its separate appeal (No. 1050) would solve that problem. We must both admit that the narrowing of the controversy by decreeing the rights of both tribes gives basis for a voluntary partition. The Navajo Tribe will never be satisfied unless the court completely recognizes its conquest, by aggression and encroachment, of four-fifths of the reservation originally established principally for the purpose of protecting the Hopi against the constant depredations and pressure of the Navajo.

The second question presented by appellant as to "whether, after the Secretary of the Interior had settled the Navajo on certain lands in 1931, he had authority thereafter, in 1936 and 1943 to unsettle them *pro tanto*," assumes facts not in the record. The trial court held that the limitation upon the area of Navajo settlement was not administratively fixed by the establishment of final and exact boundary lines until April 24, 1943.[37] The suggested 1931 line was never intended as a final line, and it was expressly recognized that future conditions might warrant changing such line.[38] The 1936 line was only tentative.[39] Appellant's argument on the question assumes that once a Navajo has set foot on new soil it becomes his exclusively. (This attitude is not without precedent in Navajo history.) Since appellant cites no author-

(37) Finding of Fact 40, pg. 217
(38) Opinion of District Court, pgs. 71, 72
(39) Opinion of District Court, pg. 72

ity in support of his argument, it is difficult to discover the legal principle, if any, upon which he relies.

Appellant's contention is anchored in the proposition that all ground yielded by the Hopi under Navajo pressure, for which Secretarial consent is implied, becomes irrevocably Navajo, and that thereafter the Secretary is powerless to do anything about it. Can the Secretary as appellant contends, take two million acres of Hopi lands and give them to the Navajo, but be powerless to take one acre from the Navajo and return it to the Hopi? An affirmative answer is so plainly wrong, unfair and unjust that the unsubstantial nature of appellant's second question becomes clearly manifest.

Neither the persistency of a controversy for a period of over 80 years, nor the quasi-sovereign status of a litigant dispenses with the merit necessary to justify review. We do not argue against full consideration of the case, but we do argue the lack of substantial questions raised by appellant. The trial was marked by judicial patience and meticulous inquiry. It is appreciated that this Honorable Court has a weighty and important responsibility to determine whether questions are substantial, but in so doing the finality of its decision that they are not may bring abrupt end to contention.

CONCLUSION

We respectfully submit, therefore, that the appellant presents no substantial question for the decision of this Court, and that the judgment of the District Court should be affirmed insofar as the questions raised by appellant are concerned.

Respectfully submitted,

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